IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,	:	
	:	
v.	:	Case No. 1:10cr200(LMB)
	:	
LEE BENTLEY FARKAS,	:	
	:	
Defendant.	:	

POSITION OF THE DEFENDANT WITH RESPECT TO SENTENCING FACTORS AND BRIEF ADDRESSING 18 USC §3553(a) FACTORS

COMES NOW, Defendant LEE BENTLEY FARKAS, (hereinafter, Mr. Farkas) by and through undersigned counsel, and hereby submits this, his position with respect to the sentencing factors to be used in this matter and his brief addressing 18 U.S.C. §3553(a) factors to assist the Court in the resolution of the sentencing issues in this case, and for this he states:

I. INTRODUCTION

The Court, although not bound by any mandatory application of the requirements and procedures established by the United States Sentencing Commission in the United States Sentencing Guidelines (hereinafter, the guidelines), will be guided by the advisory application of those requirements and procedures.

The United States Probation Office, through Karen Moran, Senior U.S. Probation Officer, has filed its presentence investigation report (hereinafter, the Report or PSIR) in this matter, and the corrections and/or additions thereto, and has provided a copy of each to counsel for Mr. Farkas. Counsel and Mr. Farkas have reviewed said report, and agree, except as addressed and corrected herein, in all material regards with the facts and the application of the guidelines as contained therein. The Government, through its counsel, Patrick Stokes, Esquire, Assistant United States Attorney, has filed its position concerning sentencing and has proposed that this Court impose a life sentence (with a

cap of 385 years and a minimum of 50 years) on Mr. Farkas.

Counsel for Mr. Farkas, counsel for the government and Ms. Moran, have consulted as necessary concerning these matters and this position document reflects those consultations.

II. FACTUAL DISPUTES

Mr. Farkas notes that he has been in custody since his trial, and has not had access to many of his records since that time. Therefore, his disclosures concerning his assets for the preparation of the Report were limited to his memory, during a period when he has been under more than normal stress. He categorically denies that he lied to Ms. Moran during the preparation of the Report, or that he purposefully failed to provide her with information she requested. Generally, he disclosed his ownership interest in various entities which own certain pieces of property. He did not then again identify those certain pieces of property because he does not own them, the entities he told Ms. Moran about own the properties or certain interests in the properties. Those entities may include LLCs, partnerships and his retirement trust. In a different situation, he did not remember, and thus did not disclose, that he and Benjamin Charles Farkas own the piece of property referenced in ¶104 of the Report and located at 3064 Bay Street, Gulf Breeze, FL. That property, including a house, was purchased on September 8, 2006 for $265,000. However, the house was demolished and the property is now a vacant lot assessed at $59,850.

In a matter which was brought to Mr. Farkas's counsel's attention on June 22, 2011, there is a piece of property at 1222 SE 7th Street, Ocala, FL, which was one of two properties Mr. Farkas purchased pursuant to this Court's order authorizing him to sell his then current residence. The property is included in the list in ¶ 94 of the Report, with a value of $537,000. However, that was the money available to Mr. Farkas pursuant to the sale authorized by this Court, and the seller wanted an additional $112,500 for the property. Mr. Farkas gave the seller a note and a mortgage, subject to the Government's mortgage on the property pursuant to the Court's order. However, the Government's

mortgage has been released and the seller has recorded his mortgage.

One indication of the complexity of the problem is, in reference to ¶ 104, the Report is internally inconsistent. Paragraph 104, sentence 1, identifies Mr. Farkas's retirement trust (which is a revocable trust and thus, simply put, is Mr. Farkas himself) as owning 50% of Nada Car Wash, LLC, which owns the property located at 815 S. Pine Avenue, Ocala, FL. Two sentences later, the Report indicates that Mr. Farkas's retirement trust owns that property. The latter sentence is, of course incorrect. Mr. Farkas's retirement trust (and, therefore, Mr. Farkas) owns only one-half of the company that owns the property, and Mr. Farkas specifically advised Ms. Moran about his retirement trust. Whether or not he was able to list every property owned by the retirement trust is problematic, since he is not, even now, sure exactly what his holdings may be. The problem with the error in the Report is that the end of ¶ 104 includes a total value of various properties referenced therein, and indicates that the total value increases Mr. Farkas's net worth by $1,476,213. Among the properties included (in addition to the foregoing Pine Avenue property) are the property located at 808 South Street, Unit 204, Key West, FL, which Mr. Farkas quitclaimed to Scott Dehne, and the property located at 517 NE 14th Avenue, Ft. Lauderdale, FL, which is owned by Sean Murla. Mr. Farkas understands that his mortgage (as the borrower) on the Dehne property was never recorded, even though his lender foreclosed on the property. At this time, to Mr. Farkas's knowledge, he has no interest in the property, either as a result of the foreclosure or as a result of the recorded quitclaim deed. The Murla property has never been owned by Mr. Farkas, nor does he have any interest in the property. Neither of those properties should be used to calculate Mr. Farkas's net worth, since neither he, nor any entity in which he has any interest, has any ownership interest in those properties.

The Report also has factual inaccuracies in ¶ 105. There, the Report indicates that Mr. Briggs advised Ms. Moran that Mr. Farkas, through his retirement trust and Robbie Roberson own the Compass Fitness Center. That is incorrect: Mr. Farkas's retirement trust owns Compass Fitness Center

in its entirety. Mr. Briggs advised Ms. Moran that Mr. Farkas, through his retirement trust owns 50% of Nada Car Wash, LLC, which owns the property and car wash located at 815 S. Pine Avenue, Ocala, FL, as discussed above. Rob-O-Co, Inc. (which is controlled by Robbie Roberson) owns the other 50% of Nada Car Wash, LLC. It is important to know that in ¶ 103 of the Report, Ms. Moran states that Mr. Farkas provided information about his partial or complete ownership, through his retirement trust, of 3201 Partnership, LLC, Ocala Car Wash, LLC, Nada Car Wash, LLC, Compass Health and Fitness, Dine Design Group, Thunder Flower, LLC, CPMG, LLC and Leeco Investments. However, the Report, in ¶ 105, seems to find fault with Mr. Farkas because he allegedly did not report that public land records reflect that his retirement trust owns three (3) other properties in Ft. Lauderdale, even though the Report concludes that they are owned not by the retirement trust, but by Thunder Flower, LLC.

Mr. Farkas does not dispute the facts contained in the PSIR (except as otherwise noted) to the extent that it is clear that much of the PSIR simply restates facts set forth in the Government's indictment of him and in the Government's statement of the case, or provided to Ms. Moran by the Government from Government files. *See*, Report, ¶¶ 15 through 35. Further, he does not dispute that a jury has found him guilty of all fourteen counts of the indictment which the Government prosecuted at trial. However, Mr. Farkas, as will be detailed below, does object to the characterization of the aforementioned guilty verdict as having found him liable for misappropriating any particular sum of money, and particularly including the sum of $2,073,867,430, which apparently provides the basis for the Report's conclusion that the potential fine for Count I (Report, ¶112) is in the maximum amount of $4,147,734,860 (twice the alleged loss). Since, as noted by the Court, there is no requirement that there be an actual loss to support a conviction of fraud to a regulatory agency so long as the statement was material (Trial Tr. vol. 7, p. 1899:19-1900:25, Apr. 13, 2011.), Mr. Farkas submits that the guilty verdict can only stand for the proposition that he submitted false information to Colonial Bank (hereinafter, Colonial) and/or caused inaccurate information to be submitted by Colonial to regulators. Further, for

the Government to argue to the jury at trial that Mr. Farkas did not have to benefit from any money Taylor Bean & Whitaker Mortgage Co. (hereinafter, TBW) received from Colonial for bank or wire fraud to be "complete" (*See, e.g.*, Trial Tr. Vol. 10, 106:7-16, 4.18.2011), and then for the Report to use the verdict the Government obtained to propose that such a fine is justified on the apparent basis that there must have been a finding that Mr. Farkas misappropriated or caused a loss in any particular amount, simply strains credulity.

Mr. Farkas also disputes the calculation of his net worth (Report, ¶¶ 94 – 96 and 101-105) and the conclusion that he has a significant net worth (Report, ¶ 106), thus making it possible for him to pay a fine imposed by this Court, specifically to the extent that it includes assets that are not his, are only partially his, or that the Government is currently seeking to confiscate as part of a forfeiture action currently pending in this case. The only assets listed in the Report that the Government, to date, is not seeking in the forfeiture action are the $1,000.00 in Mr. Farkas's Mercantile Bank account and his (50%) interest in Nada Car Wash, LLC, which is valued at $250,000.00. Assuming the Court will grant the Government's forfeiture request results in an ***initial*** proper calculation of Mr. Farkas's net worth of $1,000 + $125,000 (1/2 of $250,000) = $126,000 (total assets) - $2,000,000 (approximate outstanding attorney fees and trial costs {including experts, IKON, travel, housing, etc.} not yet paid to counsel by National Union Fire and Casualty {this amount replaces the $403,000 figure referenced in ¶ 95 of the Report, which was not a comprehensive figure when provided to Ms. Moran} through June 1, 2011) = - $1,874,000 (a deficit amount). From that starting amount the Court should also reduce Mr. Farkas's net worth by any restitution award issued by the Court. Whether or not the Court grants the forfeiture request, in whole or in part, the Court should also factor into the equation to determine Mr. Farkas's net worth the following contingent liabilities:

1. approximately $1,000,000 claimed through the reimbursement claim for defense fees and costs already paid, which was filed against Mr. Farkas

by National Union Fire and Casualty in its counterclaim in this Court in 1:11cv529;

2. potential penalties and awards in the *SEC v. Farkas* case brought in this Court (1:10cv667); and

3. potentially hundreds of millions of dollars sought as damages in private litigation brought against Mr. Farkas, allegedly relating to this case, in numerous cases throughout the country -- specifically including *Sovereign v. Farkas, Cole Taylor Bank v. Farkas, Estate of Dorothy Roberson v. Farkas* and *TBW Official Creditors v. Farkas*.

Based on the foregoing, Mr. Farkas submits that the proper calculation of his net worth will show that he possesses a massive negative net worth at this time, and under any set of circumstances, and that, therefore, no fine or costs should be imposed upon him, despite the conclusion reached in ¶ 106 of the PSIR.

III. SENTENCING FACTOR DISPUTES

Mr. Farkas disputes the PSIR's calculation of the sentencing factors under guidelines §2B1.1(b)(1)(P), §2B1.1(b)(2)(C) and §2B1.1(b)(14)(B)(i) (Worksheet A, Part 1) which govern calculation of the loss caused by the crime, the number of victims of the crime, and the offense substantially jeopardizing the safety and soundness of a financial institution respectively.

A. Calculation of Loss

Mr. Farkas has been given a 30 point offense level enhancement under the sentencing guidelines on the basis that the crimes for which he has been convicted caused a loss in excess of $400,000,000. Report, Worksheet A, Part 1. The PSIR bases this calculation on the analysis of Raymond Peroutka who testified at trial regarding a “hole” on the Colonial AOT line of $551,429,805. However, the Government's reliance on Mr. Peroutka's testimony does not take into account that he failed to factor in

the value and nature of collateral underlying the AOT agreements. Indeed his own testimony was that his charts were not intended to represent all valid collateral but only the "loan collateral amount" and that he did not evaluate the AOT documents to determine what did or did not constitute valid collateral (*See* Trial Tr. pp 2099-2100). Since Mr. Peroutka's conclusion that the AOT line is undercollateralized is, by his own admission, premised on ignoring the fact that the agreements between TBW and Colonial provided for cross-collateralization of all of Colonial's facilities, his testimony should not be a basis for such a drastic enhancement to Mr. Farkas's sentence as suggested by the PSIR.

Mr. Farkas submits that even if the Court were to accept Mr. Peroutka's testimony as to the size of the AOT hole, there simply is no evidence that the loss was intended and that in such cases the loss calculation should be based on the "pecuniary harm that the Defendant knew or, under the circumstances, reasonably should have known were a potential result of the offense." U.S.S.G. 2B1.1, Application Note 3(A)(iv).

The financial operations of TBW prior to August 2009 gave no basis for Mr. Farkas to reasonably expect his actions would result in pecuniary harm to any party. Ocala Funding, whatever other irregularities may have occurred, was meeting its obligations to pay its investors every month and all notes issued to investors by Ocala Funding prior to the July 20, 2009 notes, which were the last notes issued prior to the TBW shutdown, were paid in full, as noted by the Court on pages 100-105 of the March 23, 2001, Order in *BNP Pariba v. Bank of America*, Doc. No. 48, 09-09783 currently pending in SDNY (a copy of the first page of the said Order and pages 100-105 are attached as Exhibit A and incorporated by reference herein). TBW had not received any Plan B funding since Cathy Kissick's July 2008 decision to stop providing it (*See* Testimony of Teresa Kelly, Trial Tr. p.480) and payments were being made in a timely manner to Colonial. Further, as discussed in Mr. Farkas's version of the offense (Report, ¶69), it appeared to Mr. Farkas that TBW's previous issues with having access to enough capital to meet its loan funding obligations were on the verge of being mitigated as a

result of either the Colonial acquisition or Platinum Bank expansion. In short, far from showing any reason for him to believe that he was or would be causing a substantial financial loss to anyone, a view of the situation that confronted Mr. Farkas prior to the FBI raid of TBW and Colonial shows he had reason to believe TBW's financial situation would be improving.

Mr. Farkas's personal actions were also inconsistent with someone who believed his activity would result in a financial loss of the level asserted by Mr. Peroutka. To the contrary, when he was asked to provide additional collateral to Colonial in the form of TBW's Mortgage Servicing Rights, he did. When asked to provide additional security to Colonial in the form of his TBW stock and an insurance policy on his life, he gave it to Colonial. Finally, when Colonial was on the verge of collapse and asked for Mr. Farkas's help in trying to find investors for its capital raise, he provided it. These actions of Mr. Farkas in pledging himself and his company as security, as well as using his personal connections to try to help Colonial, indicate that, whatever other actions he may have engaged in over the years, he fundamentally did not expect those actions to result in the failure of Colonial much less the level of loss that the Government asserts. Thus, the enhancement should not be imposed.

B. Calculation of Number of Victims and Threat to Financial Institution

The PSIR proposes that Mr. Farkas's offense level be increased by a net of 8 points (reduced from 10 points pursuant to Guideline 2B1.1(b)(14)(C)) based on the determination that the offense substantially jeopardized the safety and soundness of a financial institution and the determination that the offense involved more than 250 victims, a number arrived at by including all shareholders who bought, sold or held stock from during the time period covered by the indictment. The level of enhancement referenced in the Report essentially has the effect of punishing Mr. Farkas as if the crimes of which he was convicted were the sole cause of Colonial's failure. This characterization of the effect of Mr. Farkas's activities is fundamentally at odds with the determination made by the relevant regulatory authorities, who determined that Colonial's exposure in the commercial real estate and

acquisition, development and construction sectors (ADC) "would have brought down the bank by themselves." *See*, Material Loss Review of Colonial Bank, Montgomery, Alabama, April 2010 Report of the FDIC's Office of the Inspector General (OIG), p. 24 (a copy of the first page of the said report and page 24 are attached as Exhibit B and incorporated by reference herein). Based on the foregoing, Mr. Farkas submits that the 8 point offense level enhancement based on the number of victims of the crime and the offense substantially jeopardizing the safety and soundness of a financial institution is inappropriate.

IV. GUIDELINES AND THE PSIR RECOMMENDATION

The guideline range calculated in the Report, as amended, in the addendum and corrections thereto, is based on a offense level total 43, criminal history I, calling for a life sentence of imprisonment. By running individual statutory maximum sentences for the various counts consecutively, the Court could, effectively, sentence Mr. Farkas to life in prison. Therefore, based solely upon the application of the advisory guidelines, Mr. Farkas's sentence would be life in prison. The Report also presents a calculation of a potential guideline fine range of between $25,000 and $4,147,734,860 and an as yet determined amount of restitution, in addition to the mandatory $1,400.00 payment of the special assessment.

V. §3553(a) CONSIDERATIONS

In light of the decision in *United States v. Hughes*, 401 F.3d 540 (4th Cir. 2005), the Court must "first calculate . . . the range prescribed by the guidelines. Then, the court shall consider that range as well as other relevant factors set forth in the guidelines and those factors set forth in [18 U.S.C.] §3553(a) before imposing the sentence. . . . [Then, if] the court imposes a sentence outside the guideline range, it should explain its reasons for doing so . . .." *Id*., at 546. The proper calculation of the guideline range has been addressed, and the application of the other 18 U.S.C. §3553(a) factors is considered herein.

Under 18 U.S.C. §3553(a), the sentencing court must consider seven (7) factors before imposing a sentence after conviction. The final sentence should be "sufficient, but not greater than necessary, to comply with the purposes" of sentencing set forth in the statute. 18 U.S.C. §3553(a). The following analysis sets forth specific issues which, in addition to those listed above, the Court believes warrants consideration under §3553(a).

(1) "the nature and circumstances of the offense and the history and characteristics of the defendant"

(a) The nature and circumstances of the offense

Mr. Farkas specifically reincorporates the statements set forth under Part III, herein, the "Sentencing Factor Disputes" section, and requests that in the alternative they be considered as factors warranting departure or a variance from the PSIR calculated guidelines should the Court determine that a Total Offense Level of 43 is appropriate. Similarly, Mr. Farkas reincorporates the statements set forth under Part II, herein, the "Factual Disputes" section, and requests that this Court consider those statements with respect to the potential fine imposed herein.

Context is critical in evaluating the nature and circumstances of the offenses for which Mr. Farkas has been convicted. Throughout the case, and as reflected in the PSIR, the Government has sought to characterize Mr. Farkas as a person who misappropriated large sums of money to fund a "lavish" lifestyle. However, even if one were to accept the allegations made in the Government's forfeiture arguments, the total amount of personal benefit that Mr. Farkas received from the crimes of which he has been convicted amount to significantly less than 10% of the total money the Government claims he misappropriated, and perhaps as little as 3% of that total. To the contrary, the whole point of the financial transactions forming the basis for the charges against Mr. Farkas was not to enrich himself but to keep TBW a viable company so that the hard working people who had helped him build TBW from nothing would continue to have good, stable, well paying jobs. Put another way, and even using

the Government's own figures and the testimony of its own witness, Ms. Kissick, there simply is no dispute that more than 100% of the alleged "hole" proceeds TBW received from Colonial were spent paying interest to Colonial or to fund mortgage loans, which kept people working and helped people realize the dream of home ownership.

The initial offense level as calculated in the PSIR is 47, with adjustments (some contested herein) bringing the Adjusted Offense Level to 55. The statutory provisions call for sentences of up to 30 years each for Counts 1-7 and 10-11; 20 years each for Counts 8 and 9; and 25 years each for Counts 14-16. The PSIR also indicates that the top of the guideline fine range (combined) totals $4,147,734,860. When contemplating that fine range, and the imposition of any fine, the Court should strongly consider the previously objected to calculation of Mr. Farkas's net worth. Mr. Farkas submits that based on the factors set forth above, the punishment ranges calculated in the PSIR constitute a significant over-punishment of Mr. Farkas and a sentence of no more than 15 years (180 months) would be sufficient to adequately punish Mr. Farkas and serve general deterrence purposes. In light of the financial situation in this case, no fine or costs should be imposed.

(b) **The history and characteristics of the Defendant**

Mr. Farkas's background, including his six year service in the New Mexico Air National Guard prior to his honorable discharge, is largely set forth in the PSIR. His prior criminal history is distant enough and minor enough that it does not qualify to increase Mr. Farkas's criminal history category from a category I, as indicated in the PSIR. There is also no recommendation in the PSIR for any sentence enhancement based on previous criminal behavior.

The Government has consistently gone out of its way to paint Mr. Farkas as a greedy and manipulative man out for little more than personal gain. However, even a cursory review of the large numbers of letters submitted to this Court show that Mr. Farkas is far from the greed afflicted monster which the Government attempts to paint him as. Mr. Farkas is a man with an education limited to a

high school diploma and some college, who nonetheless was able to purchase a company that had only six employees in 1993 and turn it into a company that had approximately 2,600 employees at its close in 2009. Its significance to the local economy was such that, as Margaret Potter testified, the street in front of TBW's new headquarters was dubbed the "Miracle Mile" by local business boosters. He is a man who cared deeply about his employees and making sure that they had jobs, even to the point of turning down an opportunity to cash out by selling TBW when he realized that his leaving would cost the jobs of the people who had helped him make TBW into what it was. In addition, as was testified to in Court, Mr. Farkas's involvement in the local Ocala community extended well beyond TBW and mortgages to participating in numerous other businesses including restaurants, a car wash and a gym, all of which provided additional employment in the town.

The Government's portrait of Mr. Farkas also fails to take into account Mr. Farkas's generosity in helping the community and charitable causes, including helping to defray the costs for the annual "Light Up Ocala" and "Ocala on Ice" Christmas events on the Ocala Square, funding the historic Marion Theater project in Ocala, making significant donations of both money and time as a "bell ringer" to the Salvation Army, and supporting, sometimes alone, the Humane Society for Marion County. Beyond his individual contributions and efforts, Mr. Farkas also funded the Taylor Bean Foundation, which then funded a multitude of other local charities and causes. His efforts are reflected in numerous awards he has received from organizations such as the Salvation Army and his being named Ocala Magazine's "Person of the Year" in 2007. The community recognition received by Mr. Farkas was due, in no small part, to the fact that his charitable involvement was not a matter of just writing checks, but was an active hands-on involvement from conceptualizing to participating in the charitable events he sponsored. It is obvious that he was not just trying to buy his way into acceptance. In making its case against Mr. Farkas, the Government zooms in on those aspects that make him as unappealing of a person as possible, and ignores the totality of his actions.

However, when one steps back and views the total picture that is Mr. Farkas, a more balanced picture emerges, and in viewing that total picture it is apparent that a sentence of 15 years is "sufficient, but not greater than necessary, to comply with the purposes," set forth in 18 USC §3553(a).

(2) "the need for the sentence imposed:"

(a) to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense

(i) to reflect the seriousness of the offense

The sentence to be imposed in this case must reflect the very serious nature of these offenses. Mr. Farkas was found guilty of serious crimes and the sentence proposed herein is intended to reflect the seriousness of these offenses and will lead to a significant term of imprisonment. However, the guideline sentence range calculation found in the PSIR presupposes that Mr. Farkas should be punished based on purported losses that are well in excess of what Mr. Farkas could have reasonably anticipated would be sustained by his activity, and are at least 10 times greater, and possibly as much as 33 times greater than the largest amount of personal gain even the Government alleges Mr. Farkas received. Based on the foregoing, a sentence of 15 years as previously described appears adequate to satisfy the concern for the seriousness of the crime involved.

(ii) to promote respect for the law

While not included in the statute it appears clear that the phrase "by the public" is implied in this subsection since in order for a society to live by "the rule of law," the public must be able to maintain respect for the law. This requires, *inter alia*, the public to believe that the law is applied even-handedly, and that there be a relationship between the conduct of a defendant to the harm, if any intended, the harm, if any actually caused by that conduct, and the punishment imposed, balanced by the "history and characteristics of the defendant." For the reasons previously stated, combined with the fact that Mr. Farkas's age means that any significant incarceration will consume a significant portion of

his remaining years, a sentence of 15 years, which given the media coverage this case has received will be known by the public, will promote respect for the law, without over-incarcerating Mr. Farkas for financial harm that has not been clearly proven and could not have been reasonably anticipated.

(iii) promote just punishment for the offense

It is respectfully submitted that very little distinction exists between this part (iii) and part (ii), since a just punishment for the offense should, of necessity, "promote respect for the law." Again, one must weigh the criminal behavior in context, consider the harm intended, if any, the harm caused, if any, and the background of the defendant. Based on the foregoing, the arguments set forth above are realleged as if set forth fully herein and it is submitted that a sentence of imprisonment of 15 years is a considerable period of time, and when balanced in light of reasonably anticipated harm and allegations of a proportionally small personal benefit, appears sufficiently harsh as to be "just punishment."

(b) **to afford adequate deterrence to criminal conduct**

The language of this sub-section does not clearly delineate whether the deterrence is meant to apply to the defendant, or to the general public, and both are certainly appropriate interpretations. Certainly, if one considers the deterrence of possible future criminal conduct by Mr. Farkas, the effect of:

1. the proposed sentence of 15 years;
2. the loss of his business and his credibility among his peer group and with the public;
3. the potential loss of all of his assets to forfeiture and/or restitution obligations;
4. the total preclusion of his having any regulated financial business in the future in this country and the effective restriction of his future employment in the mortgage industry, either through the SEC suit

currently pending against him or as a result of the verdict in this case; and

5. the substantial personal indebtness he has incurred (and continues to incur) as a result of this case;

are more than enough to deter him from future criminal conduct.

As for the deterrent effect on the general public, there is no easy way to calculate the deterrent effect in a case that has been as heavily publicized as this one. However, it is clear that even before Mr. Farkas is sentenced the chronicling of his "fall" has been sufficiently dispersed in the financial and business press to serve as a cautionary tale to the middle age or older executive and ownership level professionals and financial managers who would have, until recently, been considered Mr. Farkas's peer group. People in the aforementioned group will undoubtedly appreciate the fact that for a 58 year old man (Mr. Farkas will soon turn 59, Report, p. 3), particularly one with health issues significant enough to have already necessitated having a stint put in his heart, a sentence of 15 years will consume most of his effective life. Further, for a group who, due to their income and power in society, have virtually no restrictions on their movement, the idea of having every waking moment controlled and dictated in prison for 15 years only to emerge at age 73 with no assets and no prospect for any income but social security income (if that still exists) to count on will be, frankly, nothing short of chilling. For this reason and the reasons set forth above, it is submitted that a sentence of 15 years is sufficient to serve as adequate deterrence to the general public.

(c) **to protect the public from further crimes of the defendant**

This goal is very similar to that in the preceding sub-section. For the reasons set forth above, the facts of Mr. Farkas's case are such that he will be unlikely to even be in a position to commit crimes like those for which he has now been convicted, and there is nothing in his history to suggest that he is prone to criminal activity as a general matter. Therefore it is submitted that the proposed sentence is "sufficient but not greater" than necessary to protect the public from future crimes of this defendant.

(d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner

Educational or vocational training are not particularly applicable in this case, and there does not appear to be any need from a sentencing standpoint to address this issue in this case. With respect to medical care or other correctional treatment, Mr. Farkas is not aware of any issues other than those referenced in the PSIR, notably the monitoring of the stint in his heart and cholesterol issues that would be typical for someone of his age and medical history.

(3) "the kinds of sentences available"

Based upon the PSIR and the guideline ranges calculated therein, a sentence of probation is not permitted in this matter, nor is Mr. Farkas eligible for a split sentence or for some form of alternative sentence, such as home detention or community confinement. The Court is required to impose a term of imprisonment. Mr. Farkas would request that the Court suggest imprisonment at a low security facility in Ashland, KY; Butner, NC; or Coleman, FL, to enable him to be near his limited primary support network.

(4) "the kinds of sentence and the sentencing range established for

(a) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines

(1) issued by the Sentencing Commission . . ."

This is not a case involving a mandatory minimum sentence, and the sentencing range calculation has already been discussed herein.

(5) "any pertinent policy statement"

To our knowledge, sentencing in this case does not involve a policy statement. Therefore, there is no need to consider this factor.

(6) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"

Mr. Farkas was convicted for committing and conspiring to commit crimes with co-conspirators Cathy Kissick, Teresa Kelly, Ray Bowman, Desiree Brown, Paul Allen, and Sean Ragland. As of this date the co-conspirators have been sentenced as follows:

Kissick	96 months (8 years)
Kelly	3 months jail, 9 months home detention
Brown	72 months (6 years)
Bowman	30 months (2 years and 6 months)
Allen	40 months (3 years and 4 months)
Ragland	3 months jail, 9 months home detention

Mr. Farkas understands that the sentences of these individuals reflect, in each case, a downward departure for cooperation with and assistance to the Government pursuant to plea agreements and §5K motions, as well as other factors. However, insisting on his Constitutional guarantee to a trial by a jury of his peers should not result in a sentence that is grossly out of proportion to his co-conspirators. Mr. Farkas submits that a sentence of 15 years (180 months), which is almost double the largest sentence given to any other participant in the crimes for which he has been convicted, is sufficient to serve the punitive goals of sentencing without creating an unwarranted disparity in sentencing from those who have committed similar conduct, even in light of the cooperation by the those others. In addition, just as the others involved herein had no fines imposed, since Mr. Farkas has lost virtually all of his assets and is potentially subject to a forfeiture of virtually all of his remaining property, as well as a restitution obligation of extraordinary size, and since Mr. Farkas will be in federal custody for a significant period of time without future prospects for significant employment, no fine or costs of imprisonment should be imposed against him as a result of this matter.

(7) the need for restitution

The arguments relevant to restitution are identical to those set forth above relating to the calculation of loss set forth above and those set forth in Defendant's response to the Government's request for forfeiture and the same are incorporated as if set forth fully herein. Mr. Farkas will more fully develop this portion of his position with respect to the facts when appropriate.

VI. CONCLUSION

Mr. Farkas, having been found guilty in a jury trial; and the Court having reviewed the presentence investigation report, this position with respect to sentencing and the government's position with respect to sentencing and the sentencing factors enumerated in 18 U.S.C. §3553(a); and having heard the presentations of counsel and the defendant, should impose a sentence of no more than 15 years, for the reasons stated herein. In addition, since Mr. Farkas will be in federal custody for a significant period of time without future prospects for significant employment, and to reflect his actual lack of any net worth (post-forfeiture and restitution), no fine or costs of imprisonment should be imposed against him as a result of this matter.

Respectfully submitted,

LEE BENTLEY FARKAS

By: /s/

WILLIAM B. CUMMINGS, ESQUIRE
VA Bar No. 6469
Co-Counsel for LEE BENTLEY FARKAS
WILLIAM B. CUMMINGS, P.C.
Post Office Box 1177
Alexandria, Virginia 22313
(703) 836-7997
Fax (703) 836-0238
wbcpclaw@aol.com

BRUCE S. ROGOW, ESQUIRE
Pro Hac Vice
Co-Counsel for LEE BENTLEY FARKAS
BRUCE S. ROGOW, PA
500 E. Broward Boulevard, Suite 1930
Ft. Lauderdale, Florida 33394
(954) 767-8909
FAX (954) 764-1530
brogow@rogowlaw.com

CRAIG KUGLAR, ESQUIRE
Pro Hac Vice
Co-Counsel for LEE BENTLEY FARKAS
LAW OFFICE OF CRAIG KUGLAR, LLC
1130 Piedmont Avenue, #913
Atlanta, Georgia 30309
(404) 432-4448
FAX (404) 393-8007
ck@kuglarlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to at least the following registered ECF users:

Paul J. Nathanson, Esquire
paul.nathanson@usdoj.gov
Charles Connolly, Esquire
charles.connolly@usdoj.gov
United States Attorney's Office for
the Eastern District of Virginia
2100 Jamieson Avenue
Alexandria, Virginia 22314

/s/

WILLIAM B. CUMMINGS, ESQUIRE
VA Bar No. 6469
Co-Counsel for LEE BENTLEY FARKAS
WILLIAM B. CUMMINGS, P.C.
Post Office Box 1177
Alexandria, Virginia 22313
(703) 836-7997
Fax (703) 836-0238
wbcpclaw@aol.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BNP PARIBAS MORTGAGE CORPORATION and BNP PARIBAS,

Plaintiffs,

- against -

BANK OF AMERICA, N.A.,

Defendant.

09 Civ. 9783 (RWS)

OPINION

DEUTSCHE BANK AG,

Plaintiff,

- against -

BANK OF AMERICA, N.A.,

Defendant.

09 Civ. 9784 (RWS)

OPINION

A P P E A R A N C E S:

Attorneys for Plaintiffs BNP Paribas Mortgage Corporation and BNP Paribas

BOIES SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
By: Robin A. Henry, Esq.
Motty Shulman, Esq.
Jack Wilson, Esq.

Exhibit A

made by a third party" is best read as apply when a third-party recoverable entails notice and assumption of defense, namely, when there is a "claim" by a third-party. Cf. Promuto, 44 F. Supp. 2d at 650-51 (third-party notice provision applied to "third-party claims" and claims were not a subset of the recoverables in indemnification clause).

Accordingly, the fact that third party actions are explicitly referenced in the indemnification provision does not amount to language that demonstrates an "unmistakably clear" intent to cover first-party losses. Bridgestone/Firestone, 98 F.3d at 20-21; Hooper, 549 N.Y.S.2d at 367; Sequa, 851 F. Supp. at 111 n.7.

VIII. PLAINTIFFS LACK STANDING TO SUE BASED ON OCALA NOTES ISSUED BEFORE JULY 20, 2009

BoA argues that even if it breached the Facility Documents between January 25, 2008 and July 20, 2009, it cannot be liable for those breaches because Plaintiffs received full payment on the Ocala Notes each time they were rolled over. Thus, BoA argues, Plaintiffs lack standing to bring a claim based on events prior to the issuance of the July 20, 2009 Ocala

Notes, because their status as noteholders has expired as to all Ocala Notes prior to those issued on July 20, 2009.

The authorities cited by BoA stand for the proposition that a noteholder who is paid in full may not sue the borrower for breaches of the note or undertakings made by the borrower to support the note. See e.g., 83 N.Y. Jur. 2d Payment and Tender § 141 (West 2010) (legally sufficient tender discharges collateral undertakings by the borrower, such as mortgages, liens and pledges); In re Paradis' Estate, 186 A. 672, 675 (Me. 1936) ("When commercial paper is paid by the party whose debt it appears to be, it becomes functus officio, commercially dead.").

Plaintiffs argue that they are not suing BoA for Ocala's failure to pay the principal due on the Ocala Notes themselves or in respect of related undertakings made by Ocala in connection with issuance of the Ocala Notes. Rather, they are suing for BoA's alleged breaches of the Facility Documents that resulted in the loss of the collateral that was supposed to be backing the Ocala Notes. Plaintiffs contend that BoA executed the Facility Documents on June 30, 2008, and those documents still govern and control BoA's duties and responsibilities to Ocala and the noteholders, that such duties did not cease on repayment of a particular note issue and begin anew on the

issuance of new notes and that, for this reason, BoA did not enter into new Facility Documents for each roll of the notes. For this reason, Plaintiffs contend that BoA's argument that "payment of the earlier notes extinguished any related contract claims as a matter of law" misses the point.[11]

DB has alleged that BoA's breaches of the Facility Documents caused Ocala to lose the cash and mortgages that would have been available to repay the principal due on the Ocala Notes issued on July 20, 2009, and that this loss of collateral proximately caused the Ocala Notes to lose their value. Based on this allegation, each rollover of Ocala Notes did not extinguish claims on those notes because each rollover was premised on BoA's continued performance of its duties under the Facility Documents. DB has also alleged that BoA's breaches of the Facility Documents on July 20, 2009 caused it to roll over its investment in Ocala Notes and thereby proximately caused its loss.

---

[11] Plaintiffs argue that the cases cited by BoA also miss the point, as each involved non-recurring debt obligations that were extinguished and whose governing documents expired or terminated upon payment at final maturity. See Green v. Foley, 856 F.2d 660 (4th Cir. 1988) (non-recurring bank notes); Bank of Lexington v. Jack Adams Aircraft Sales, Inc., 570 F.2d 1220 (5th Cir. 1978) (non-recurring aircraft mortgage); In re Paradis' Estate, 186 A. 672 (Me. 1936) (a single issuance of commercial paper); Great W. Bank v. Kong, 108 Cal. Rptr. 2d 266 (Ct. App. 2001) (single commercial mortgage); Caplan v. Unimax Holdings Corp., 188 A.D.2d 325, 325 (N.Y. App. Div. 1992) (single debenture).

However, even Plaintiffs have acknowledged that each new issuance of Ocala Notes was a "separate transaction." (See BNP AC ¶ 42; DB AC ¶ 5.) Accordingly, BoA contends that they were not revolving or "recurring" debt obligations, and that the situation is no different from one where a noteholder whose note was repaid decided not to reinvest, and a new noteholder purchased a later issue of notes. In that case, the new noteholder could not sue for a breach that occurred before it purchased the new notes. Thus, according to BoA, the fortuity that Plaintiffs were both the new and the old noteholders is irrelevant.

Plaintiffs' standing to sue under the Base Indenture and Security Agreement derives from their third-party beneficiary status as "Noteholders." For this reason, Plaintiffs' status as noteholders, and their resulting standing to sue for breaches while they held the notes, was legally extinguished each time they received payment in full on their notes. See 70 C.J.S. Payment § 32 (payment "extinguishes the debt for which it is presented"). Plaintiffs could not have retained noteholder status after the attendant Ocala Notes were paid and extinguished and only obtained noteholder status again upon the acquisition of the new Ocala Notes. See Caplan v. Unimax Holding Corp., 188 A.D.2d 325, 325 (N.Y. App. Div. 1992).

DB's argument that BoA's alleged breaches "caused DB to roll over its investment in the Ocala Notes," (DB Opp. 35) suggests that DB might have been fraudulently induced into rolling over its notes and acquiring new notes, but it has not pleaded such a claim in its Amended Complaint.

Finally, Plaintiffs argue that any breaches by BoA prior to July 20, 2009 and BoA's knowledge of Ocala's insolvency during the lifetime of the Facility are evidentiary and/or causation issues that cannot be determined on a motion to dismiss. In re Morgan Stanley ERISA Litig., No. 07 Civ. 11285, 2009 WL 5947139, at *15 (S.D.N.Y. Dec. 9, 2009) (Generally, "loss causation is an issue of fact and is thus not properly considered at this early stage in the proceeding" (quotation marks omitted)); see also Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc., 341 F. Supp. 2d 258, 271-72 (S.D.N.Y. 2004) (whether there is a causal connection between alleged contract breaches and damages are questions to be addressed at summary judgment or at trial, not on a motion to dismiss).

However, this is an issue of standing, rather than causation or evidence, and is therefore properly raised and

resolved at this stage. See Wolfson v. Conolog Corp., No. 08 Civ. 3790, 2009 WL 465621, at *3 (S.D.N.Y. Feb. 25, 2009).

Plaintiffs therefore lack standing to bring claims based upon Ocala Notes issued prior to July 20, 2009.

IX. BNPP IS NOT A PROPER PARTY TO THIS ACTION

The claims of BNPP, which was added to the Amended Complaint filed by the BNP Parties, fail as a matter of law because BNPP has not alleged that it suffered any injury in its capacity as Swap Counterparty or otherwise. Nor can BNPP sue for injuries suffered by its subsidiary, BNP. See, e.g., Hudson Optical Corp. v. Cabot Safety Corp., No. 97-9046, 1998 WL 642471, at *3 (2d Cir. Mar. 25, 1998) (unpublished) (holding that a parent corporation lacks standing to sue for injuries allegedly sustained by its subsidiary); Alexander & Alexander of N.Y. Inc. v. Fritzen, 495 N.Y.S.2d 386, 388 (1985) ("[O]ne corporation will generally not have the legal standing to exercise the rights of other associated corporations."), aff'd, 68 N.Y.2d 968 (1986); see also Diesel Sys., Ltd. v. Yip Shing Diesel Eng'g Co., 861 F. Supp. 179, 181 (E.D.N.Y. 1994) ("A corporation does not have standing to assert claims belonging to

Office of Inspector General

Office of Material Loss Reviews
Report No. MLR-10-031

Material Loss Review of Colonial Bank, Montgomery, Alabama

Exhibit B

April 2010

In its comments, the ASBD discussed its perspective on bank management based on the department's long, regulatory involvement with Colonial. In brief, the ASBD stated that attempts by regulators over the years to discourage or limit Colonial's CRE and ADC exposures were viewed as attempts to micromanage the bank and change its basic business model. Management's philosophy also called for aggressive growth into Florida and other high-growth real estate markets while operating the bank with significant leverage. Consequently, the bank generally operated with lower capital ratios than other banks regulated by the ASBD.

With regard to the specific cause of Colonial's failure, the ASBD indicated that the report accurately stated the ASBD's reasons for closing the bank on August 14, 2009. The ASBD pointed out that although the MWL operations caused significant losses, the CRE and ADC exposures would have brought down the bank by themselves.

With respect to supervision, the ASBD stated that when Colonial pursued charter changes in 2003 and 2008, the Boards of Directors and management were not receptive to the findings and recommendations conveyed to them by examiners prior to the respective conversions. Additionally, the relationship between examiners and senior management had become increasingly strained and communication had deteriorated. The ASBD noted that banks should not be allowed to ignore examiner concerns and recommendations no matter how determined bank management is to do so. In that regard, the ASBD strongly agreed with most of the improvements in the policy statement on regulatory conversions discussed in the body of our report. The ASBD also indicated that it would not do another conversion without a full-scope examination and that it is very important, in its view, that the existing regulator be allowed to follow up on any outstanding issues post-conversion.

The ASBD stated that, in the case of Colonial, the transition meeting with the FDIC and the OCC after the conversion was effected was a very positive step. In its view, prompt and appropriate regulatory actions were taken by the FDIC during the period of its supervision. Further, the ASBD believes that there were no significant delays in downgrading CAMELS ratings and putting enforcement actions in place to address the bank's problems.

Finally, the ASBD provided its views on PCA and the FDIC's backup authority, noting that:

- The PCA capital guidelines do not properly account for current experience in this banking crisis, the guidelines should be increased, and the term "well capitalized" should be eliminated; and

- The FDIC should be able to exercise backup authority any time it sees excessive risks at insured institutions.